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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5324

JULIA GONZALEZ, *etc.*,

Petitioner,

v.

JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

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Note, *Columbia Law Review,* Volume 72 No. 8, p. 1404 "Federal Jurisdiction Over Challenges To State Welfare Programs".....17

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CITATIONS WITH RESPECT TO THE INSTANT CASE

Gonzalez v. Young, 418 F.Supp. 586 (D.N.J.—1976).
Gonzalez v. Young, 560 F_2 160 (3 Cir.—1977).

JURISDICTION OF THIS COURT

A petition for a writ of certiorari was filed on August 24, 1977. Certiorari was granted on February 21, 1978. Jurisdiction is conferred by 28 *U.S.C.* 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C.A. 1343(3) and (4), 1976 Ed. p. 310

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.A. 1983, 1974 Ed. p. 250

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S.C.A. Const. Art. VI cl. 2 1968 Ed. p. 715

This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made or which shall be made, under the Authority of the United States shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.S.C.A. 606(e)(1), 1974 Ed. p. 126

The term "emergency assistance to needy families with children" means any of the following, furnished for a period of not in excess of 30 days in any 12 month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives, specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payment care or services involved are necessary to avoid destitution of such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment:

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of such child or any other member of the household in which he is living; and

(B) such services as may be specified by the Secretary but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

New Jersey Administrative Code N.J.A.C. 10:82-5.12(c)(1), Volume 10 p. 228

Emergency Shelter: When an actual state of homelessness exists or is manifestly imminent, the county welfare board shall authorize payment of the actual cost of adequate emergency shelter arrangements at the most reasonable rate available for a specified temporary period not to exceed the calendar month following the month in which the state of homelessness first becomes known.

QUESTIONS PRESENTED

a) Is 42 *U.S.C.* 1983 an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3).
b) Is 42 *U.S.C.* 1983 an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4).
c) Does the Supremacy Clause satisfy the "secured by the Constitution" requirement of 28 *U.S.C.* 1343(3).

BASIS OF FEDERAL COURT JURISDICTION

Jurisdiction is in issue. Petitioners assert jurisdiction under 28 *U.S.C.* 1343(3) and (4). *See* also 42 *U.S.C.* 1983 and the Supremacy Clause, *U.S.C. Const.* Art. VI *cl.* 2.

STATEMENT OF THE CASE

On February 2, 1976 petitioner was set upon by a robber who stole all of her February, 1976 welfare funds. As a result petitioner and her two infants were rendered destitute without any money whatsoever for the remainder of February, 1976, specifically, without money to pay February, 1976 rent and utility accruals. Petitioner applied to her local welfare office for "emergency assistance" which was denied since New Jersey law required petitioner to be in an actual or imminent state of homelessness before emergency funds would be granted. *See N.J.A.C.* 10:82-5.12(c)(1). Petitioner then filed an action in U.S. District Court for the District of New Jersey alleging that the "homelessness" prerequisite in New Jersey law impermissibly narrowed the term "destitution" as the same is contained in the federal genesis of eligibility for welfare emergency assistance. *See* 42 *U.S.C.* 606(e)(1). Petitioner's complaint was ultimately dismissed by the 3rd Circuit on July 15, 1977 for want of jurisdiction. The 3rd Circuit held:

(a) 42 *U.S.C.* 1983 is not an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3);
(b) 42 *U.S.C.* 1983 is not an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4);
and (c) the Supremacy Clause does not satisfy the "secured by the Constitution" requirement of 28 *U.S.C.A.* 1343(3).

The underpinning of these holdings is that 1983 and 1343(3) and (4) are not coextensive. It was this perception which compelled us to file our petition for certiorari.

POINT I

42 U.S.C. 1983 AND 28 U.S.C. 1343(3) ARE COEXTENSIVE

42 *U.S.C.* 1983 and 28 *U.S.C.* 1343(3) germinated in the Civil Rights Act of 1871. There was no distinction between substance and jurisdiction contained in the Civil Rights Act of 1871. If there was a violation of the Act jurisdiction clearly reposed in federal court. The question projected *sub judice* is whether Congress has since 1871 created a gap between 42 *U.S.C.* 1983 and 28 *U.S.C.* 1343(3). Put differently the question is whether Congress has created the paradoxical situation in which some violations of the federal Civil Rights Act (substantive part 1983) are not redressable in federal court (jurisdictional part 1343(3)). We submit that our adversaries will argue however that a gap was created by the revisions to the progenitors of 1983 and 1343(3) which occurred in the years 1875 and 1911.

1875

In 1875 there was a codification change in the federal statutes. The various federal statutes were consolidated under separate titles in what has become the Revised Statutes. In the process the substantive provision of Section 1 of the 1871 Act became separated from its jurisdictional counterpart. Jurisdiction respecting substantive violations, that is, violations of the 1871 Act, was conferred on both the district courts and the circuit courts. However, in the grant to the circuit courts the language "an Act of Congress providing for equal rights" first appeared. It is this language

which our adversaries seize in support of their chasm theory. They say in effect that while the progenitor to 1983 created a substantive cause for transgressions of rights secured by federal statutes the progenitor to 1343(3) created a federal jurisdictional conduit only when the federal statute transgressed is a statute "providing for equal rights". In essence they argue that the term "equal rights" narrows those 1983 violations cognizable in federal court and they further argue that 1983 does not itself provide for equal rights. We submit that this perception is untenable.[1]

It is axiomatic that a court in interpreting statutes must enforce the legislative intent. *Burd v. McCullough*, 217 F_2 93 (3 Cir., 1958), *Gorin v. U.S.*, 111 F_2 712 (9 Cir. 1940). The majority of commentators who have studied the questions under consideration *sub judice* have concluded that the 1875 revision contains no evidence of a congressional intent to gap the progenitors of 1983 and 1343(3). *See Herzer, Harvard Civil Rights—Civil Liberties Law Review*, Volume 6, Number 1, Page 1, December 1970 "Federal Jurisdiction Over Statutorily Based Welfare Claims", Cover, *Clearinghouse Review* Feb.-March 1969 page 6 "Establishing Federal Jurisdiction in Actions Brought To Vindicate Statutory (Federal) Rights When No Violation of Constitutional Rights Are Alleged", Note

1. For heuristic purposes we will proceed as though the "equal rights" phraseology applied both to district and circuit courts. In point of fact the district court language in the 1875 revision did not contain the phrase "equal rights". Thus the coextensivity anent district courts and actions respecting 1983's predecessor was clearly established in 1875. This is very important since it is undisputed that: "Congress in 1875 also enlarged the scope of 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution." *Lynch v. Household Finance Corporation*, 92 S.Ct. 1113, 1120 *n.* 15 (1972).

Columbia Law Review, Volume 67, Number 1, Page 84 "Federal Judicial Review of State Welfare Practices". The leitmotif which runs through these treatises was succinctly stated by Cover, *supra* at p. 5:

> In 1875 Congress revised and consolidated existing federal statutes formerly published as Statutes at Large into various titles collectively termed the Revised Statutes. *The primary object of the revision was to reorganize and restate the law rather than to change it.* (Emphasis added).

Resort to legislative history specifically the Congressional Record buttresses *Cover's* conclusion. *See* the following colloquy at 2 Cong. Rec. 129 (1873):

> Mr. Wood: Will there be anything in this revision of the laws that we have not already in the Statutes at Large.
>
> Mr. Poland: [Chairman of the Committee on Revisions] Nothing at least we do not intend there shall be.

Obviously there is no support in this exchange for the proposition that a significant jurisdictional modification was envisioned by Congress. Judicial nourishment for this perception is also readily available. *See Blue v. Craig*, 505 F_2 830 (4 Cir.—1974), *Gomez v. Florida State Employment Service*, 417 F_2 569 (5 Cir.—1969), *Vasquez v. Ferre*, 404 F.Supp. 815 (D.N.J.—1975), *Bomar v. Keyes*, 162 F_2 136 (2 Cir.) *cert. den.* 332 U.S. 825 (1947); *cf. Lynch v. Household Finance Corporation* 92 S.Ct. 1113 (1972) *note* 7. The *Vasquez* court appropriately characterized the 1875 revision at *p.* 824 of 404 F.Supp.:

> The purpose of the 1875 revision was not to effect substantive changes in the 1871 Act; but instead merely sought to divide it into separate jurisdictional and substantive statutes.

In light of all of the aforesaid we submit that the 1875 revision does not support the premise of the gap theorists.*

1911

In 1911 there was another revision of the federal statutes. Jurisdiction with respect to transgressions of the Civil Rights Act of 1871 was entirely removed from the circuit courts and was placed in the district courts. Problems arise because in the revision the troublesome "equal rights" language was placed in the district court jurisdictional grant. Be that as it may the relevant purpose that emerges from the legislative history of the 1911 revision substantiates the conclusion that Congress did *not* intend to gap 1983 and 1343(3). Thus Senate Report #388 61st Congress 2d Session p. 2 (1910) provides unequivocally:

> The changes proposed by the bill are generally of form rather than substance. Where the substance of the laws would appear to be changed it is generally because of the reorganization and consolidation of the law.

This clear statement certainly belies any perception that Congress in 1911 intended to gap 1983-1343(3). Moreover as noted previously in this brief during the 1875 revision the jurisdictional grant to the district courts was clearly coextensive with substantive actions respecting 1983's predecessor.[2] This is important in light of the following

* *Accord Ex. Bd. of Eng. Arc. & Sur. v. Flores De Otero*, 96 S.Ct. 2264 (1976).

2. This is so since the troublesome "equal rights" language was appended in 1875 only to the circuit court grant, not to the district court grant.

language from the Senate Report (388 61st Congress 2d Sess. pt. 1 at 15 (1910)) concerning the 1911 revision:

> This paragraph *merges* jurisdiction now vested in the district courts by paragraph 12 of section 563 and in the circuit courts by paragraph 16 of section 629 and vests it in the district courts. (Underlineage added.)

This language contains no clear indication that the district court jurisdictional component was vitiated in merger. To the contrary the more appropriate reading is that the district court jurisdictional component was retained in merger thus leaving no doubt as to the coextensivity of 1983 and 1343(3). Most commentators who have studied the 1911 revision have drawn this conclusion. Thus in the note at 67 *Columbia Law Review* 84 113 (1967) "Federal Judicial Review of State Welfare Practices" the author states:

> Certainly there is no evidence that Congress intended to diminish the prior jurisdiction of the district court. Indeed some of the brief legislative history suggests precisely the contrary—that the sole purpose was to remove any original civil rights jurisdiction from the circuit courts *and to vest in the district courts whatever jurisdiction had previously existed in the two courts.* (Emphasis added.)

Based on the foregoing we submit that neither the revision of 1875 nor the revision of 1911 illumine a Congressional intent to gap 1983 and 1343(3). Statutes *in pari materia*, such as 1983 and 1343(3), are to be construed with reference to each other, *Anderson v. Gladden*, 188 F.Supp. 666 (D.C. Or.—1960); are to be harmonized, *Day v. North Am. Rayon Corp.*, 140 F.Supp. 490 (D.C. Tenn.—1956); and are to be construed in light of the evil sought to be remedied. *Jones v. Ingling*, 191 F.Supp. 559 (D.C. Guam,

1961). The purpose underlying 1983 and 1343(3) and their predecessors was to provide a comprehensive federal remedy for transgressions of the substantive act. *See*, Cover *supra* at *pps.* 5-7. In light of this it would simply be absurd to hold in the face of that clear objective that Congress nonetheless neglected to provide federal jurisdiction over certain transgressions admittedly within both the perimeters and parameters of 1983 and its predecessors. This point was judicially echoed in *Blue v. Craig, supra* at *p.* 841 of 505 F_2:

> Only when there is no uncertainty should the courts conclude that Congress has set up a remedial system which overlooks nothing but the minor technicality of giving jurisdiction to some court. The courts should be especially reluctant to reach such a result where there is every evidence that a federal forum was a focal point of the legislation.

Since Congress enacted a legislative scheme of federal oversight anent civil rights transgressions it is absurd to argue that Congress did not provide coequal federal jurisdiction to redress those transgressions. Such an argument is clearly without merit. The courts cannot and will not impute to Congress an intent to produce in a statute an absurd result. *Yankee Network v. Federal Communication Commission*, 107 F_2 212 (D.C. Cir.—1940). It is equally vacuous to argue in the absence of an express repealer, that Congress impliedly repealed the 1871 coequal jurisdictional grant during the revisions of 1875 and 1911. The law is well settled that implied repealers are disfavored. *State of Ga. v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) *rehearing den.* 65 S.Ct. 1018. This principle is of undeniable application in the present case. Indeed the

Supreme Court has recognized this. *See Lynch v. Household Finance Corporation, supra* at *pps.* 118 and 1120 of 92 S.Ct.:

> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of Art. 1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of 1983 and 1343(3).
>
> .....
>
> .....
>
> The 1875 Act giving the federal courts power to hear suits arising under Art. III Sec. 2 of the Constitution was, like the Act of 1871, an expansion of national authority over matters that before the Civil War, had been left to the States. F. Frankfurter and J. Landis The Business of the Supreme Court 65 (1928); *Zwickler v. Koota*, 389 U.S. 241, 245-248, 88 S.Ct. 391, 393-395, 19 L.Ed.2 444; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 V. Pa. L. Rev. 639, 645 (1942). The Act therefore, is 'clearly' . . . part of, rather than an exception to, the trend of legislation which preceded it.' *Zwickler* supra. There was very little discussion of the measure before its enactment, in contrast to the extensive congressional debate that attended the passage of the Act of 1871. And there is, as a result, no indication whatsoever that Congress, in a rather hastily passed measure, intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation.
>
> The 'cardinal rule that repeals by implication are not favored' *Rosado v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352 80 L.Ed. 351, *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 437, 88 S.Ct. at 2202; thus counsels a refusal to pare down 1343(3) jurisdiction—and the substantive scope of 1983—by

> means of the distinction between personal liberties and property rights, *or in any other way.* The statutory descendants of Art. 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origin and their language dictate. (Emphasis added).

What could be clearer. 1343(3) and 1983 are not to be pared down by use of semantical diversions or distended analytical processes. Certainly this admonition applies to the propounders of a gap theory, particularly given their complete inability to show clear congressional germination or ideation respecting a gap. In point of fact Congress never intended a gap. 1343(3) and 1983 are coextensive. When there is a violation which falls within the ambit of the 1983 jurisdiction to redress the transgression reposes in the federal district courts by virtue of 1343(3).[3]

Before concluding this point we note that our adversaries are likely to rely on a series of cases including *Rosado v. Wyman*, 414 F_2 170, 181 (2 Cir., 1969) *rev'd. on other grounds* 397 U.S. 397 (1970), *McCall v. Shapiro*, 416 F_2 246 (2 Cir. 1969), and *People of State of New York v. Galamision*, 342 F_2 255 (2 Cir. 1965) *cert. den.* 85 S.Ct. 1342 (1966) for the proposition that a gap was created. Our response is fourfold: *First,* the rationales ununciated *supra,* in the treatises and in the cases cited are far more persuasive than those of the *Rosado* line; *Second, Rosado,* itself, was overly concerned with the welfare case-floodgate theory, a theory entirely discredited by the

3. Still another approach which impacts the gap theorists was set forth in *Vasquez* and *Blue, viz*: the actual words "equal rights" carried in 1875 no restrictive denotation or connotation and accordingly in its broadness the phrase "equal rights" easily embraced all substantive transgressions. *See* also *Ex. Bd. of Eng., Arch. and Sur. v. Flores De Otero*, 96 S.Ct. 2264 (1976).

Supreme Court in the *Rosado* appeal at 90 S.Ct. 1222; *Third, McCall* was foundated on a proprietary-personal liberty dichotomy later vacated by the Supreme Court in *Lynch v. Household Finance Corporation, supra.* at p. 1121; *Fourth, Galamision* was entirely a removal case thus bringing to the fore factors not present *sub judice*, to wit: friction between federal and state sovereignties and the restricted application of removal to the civil rights area.

POINT II

42 U.S.C. 1983 and 28 U.S.C. 1343(4) ARE COEXTENSIVE

1343(4) was enacted with the Civil Rights Act of 1957. It provides that "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . ." Since there can be no doubt that 1983 is an act of Congress providing for the protection of civil rights, see *Cover, Clearinghouse Review* Feb.-Mar. 1969 "Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged", it would seem that the case for the coextensivity of 1983 and 1343(4) is made. However we anticipate that our adversaries will argue that 1343(4) does not implicate statutes, such as 1983, enacted prior to 1957. Whatever surface appeal this argument may have had at one time it has now been laid to rest by the Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones* the court sanctioned the use of 1343(4) as a

jurisdictional conduit for transgressions of the Civil Rights Act of 1866. In light of this decision there is no longer any merit to the "antedate position". Moreover, the legislative history of 1343(4) supports *Jones. See* 103 Cong. Rec. 16620 (1957) where then Senate majority leader, Lyndon Johnson, describing 1343(4) said:

> [it] [e]xtends the jurisdiction of the district court to include any civil action begun to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . (Emphasis added).

Certainly it is sheer fantasy to posture the "antedate argument" in the face of clear Congressional intent to extend jurisdiction to *any* act of Congress providing for the protection of civil rights.

In addition the general thrust of the 1957 Civil Rights Act provides further nourishment for this thesis. The general thrust of a statute is relevant to determining the meaning to be given to one of its sections. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947). Apart from the one voting provision in Part IV, 71 Stat. 637, the Act was entirely a procedural one, establishing a Commission on Civil Rights, Part 1, 71 Stat. 634, an additional Assistant Attorney General to concentrate on civil rights enforcement, Part II, 71 Stat. 637, and specific enforcement authority in the voting area for the Attorney General, Part 1 L. 71 Stat. 637. As the House Report indicates "[t]he provisions of the bill H.R. 6127 are designed to achieve a more effective enforcement of the rights guaranteed by the Constitution and laws of the United States" U.S. Code Cong. & Adm. News 14 Rep. 29, 85th Cong. 1st Sess., 1966, 1970 (1954). Certainly use

of the phrase "a more effective enforcement of the rights guaranteed by the Constitution and laws of the U.S." eviscerates the central rationale of our adversaries "antedate position". *Accord Gomez v. Florida State Employment Service*, 417 F_2 569 (5 Cir.—1969); *Vasquez v. Ferre*, 404 F.Supp. 815 (D.N.J.—1975) *cf. Moore v. County of Alameda*, 411 U.S. 693 (1973). The *Gomez* court flat out stated at p. 580 of 417 F_2 *n.* 39 that: "1343(4) does provide jurisdiction for all claims stated under 1983. The *Vasquez* court, incorporating *Jones* held at p. 825 of 404 F.Supp:

> The decision of the Supreme Court in *Jones v. Alfred H. Mayer Co.* 392 U.S. 409, 88 S.Ct. 2186 provides support for the view that statutes such as 1983 are among those acts providing for the protection of civil rights within the meaning of 1343(4).[4]

Despite the aforesaid we anticipate that our adversaries will rely on *McCall v. Shapiro*, 416 F_2 246 (2 Cir.—1969) and *Almenares v. Wyman*, 453 F_2 1075 (2 Cir., 1971) *cert. den.* 405 U.S. 544 (1972) for the proposition that 1343(4) does not implicate 1983 in the context of a welfare challenge under the Social Security Act. Our response is fourfold: *First*, the rationales enunciated by the courts in *Jones, Gomez, Blue*, and *Vasquez* are more persuasive than those stated in *McCall* and *Shapiro*; *Second, McCall* rests to a large degree on the property right-personal liberty dichotomy later struck by the Supreme Court in *Lynch*; *Third*, McCall is further foundated on the assertion that the Social Security Act is not an Act of Congress providing for

4. *Accord. Blue v. Craig*, 595 F_2 830 (4 Cir.—1974): "1983 is historically and textually a civil rights act—certainly 1983 is an act of Congress providing for the protection of civil rights" p. 842.

civil rights; however, even assuming *arguendo* this to be true it does not at all impinge on the conclusion that 1983 is itself an Act of Congress providing for the protection of civil rights; *Fourth, Almenares* is so elliptical and so laden with dicta that one cannot honestly conclude whether it is predicated on the second error of *McCall* or on a misinterpretation of 1343(4). *See* Note 27 *Columbia Law Review* Volume 72 #8 1404, 1427 "Federal Jurisdiction Over Challenges To State Welfare Programs".

In conclusion we assert that the "antedate argument" is without merit and we further assert that 1983 is undisputedly an Act of Congress providing for the protection of civil rights within the ambit and intendment of 1343(4). Accordingly when there is a violation which falls within the purview of 1983 jurisdiction to redress the transgression reposes in the federal district courts by virtue of 1343(4).

POINT III

SINCE 1343(3), 1343(4) AND 1983 ARE COEXTENSIVE JURISDICTION IS ESTABLISHED IN THE INSTANT CASE EVEN ACCEPTING ARGUENDO THE PREMISE THAT THE SOCIAL SECURITY ACT IS NOT AN ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS OR FOR THE PROTECTION OF CIVIL RIGHTS

We anticipate that our adversaries will argue that federal jurisdiction is wanting in the matter *sub judice* even if 1343(3), 1343(4) and 1983 are coextensive because the Social Security Act is neither an Act of Congress providing,

for equal rights nor an Act of Congress providing for the protection of civil rights. We concede that there is ample authority for the proposition that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights. *See Andrews v. Maher*, 525 F_2 113, 118 (2 Cir., 1975), *Randall v. Goldmark*, 495 F_2 356 (1 Cir. - 1974), *Aguayo v. Richardson*, 473 F_2 1090, 1101 (2 Cir.) *cert. den. sub nom Aguayo v. Weinberger*, 414 U.S. 1146 (1974). Nonetheless, as discussed *supra* in this brief, 1983 is an Act of Congress providing for equal rights and for the protection of civil rights. *See Gomez v. Florida State Employment Service*, supra at *p.* 580 *n.* 3a of 417 F_2:

> .... 1983, although operating as a conduit through which other statutory rights are protected is itself an Act of Congress providing for the protection of civil rights.

See further *Blue v. Craig*, supra at *p.* 842 of 505 F_2:

> The Court in that case [McCall] bluntly declared that '[T]he Social Security Act is not one providing for the protection of civil rights'.... The difficulty with the conclusion is that it overlooks the fact that while the alleged illegality of the deprivation complained of finds its warrant in the Social Security Act, the actual cause of action is granted not by the Social Security Act but by 1983....

In sum we assert that 1983 connects directly to 1343(3) and (4) since it is itself an act of Congress providing for equal rights and for the protection of civil rights.[5] That

5. Our adversaries argument that jurisdiction is wanting because the Social Security Act does not provide for equal rights or for the protection of civil rights is specious and if true would completely vitiate

(continued)

being so the only inquiry remaining is whether a claim under the Social Security Act falls within the ambit of 1983. Put differently the remaining inquiry is whether 1983 embraces a wholly statutory claim. Clearly it does. The word "and" in the phrase "secured by the Constitution and laws" contained in 1983 is disjunctive. It is thus undisputed that 1983 embraces a wholly statutory right. *See Peacock v. City of Greenwood*, 384 U.S. 808 (1964), *Bomar v. Keyes*, 162 F_2 136, 138-139 (2 Cir.) *cert. den.* 332 U.S. 825 (1947) *cf. Monroe v. Pape*, 365 U.S. 167 (1961), *Lynch v. Household Finance Corp.*, supra.

We conclude by noting that the positions that we have taken in this brief are entirely in harmony with the principles of federalism and with practicality. A main function of the federal courts is to vindicate federal rights. This is certainly no less true in the area of AFDC welfare payments where more than 75% of the financial burden is borne by the federal government. Indeed the Supreme Court recently embraced this view in *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970) at 1223:

> [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field [welfare]....
> It is ... peculiarly part of the duty of this tribunal no less in the welfare field than in other areas of the law, to

(footnote continued from preceding page)

1983. If the Social Security Act did in fact provide for equal rights or for the protection of civil rights it would plug directly into 1343(3) and (4). There would be no need for 1983. But if you accept our adversaries argument 1983 ... o serves no function if the Social Security does not provide for equal rights or for the protection of civil rights. Such a reading renders 1983 completely sterile. We submit that this is entirely unacceptable.

> resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated speaking for the court in *Helvering v. Davis*, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1937): 'When [federal] money is spent to promote the general welfare the concept of welfare is shaped by Congress, not the states' *cf. Lassen v. Arizona, ex rel. Arizona Highway Dept.* 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2 515 (1967).[6]

The above statement, attractive on its own, becomes even more attractive when one views it in concert with other factors that militate in favor of federal jurisdiction: 1) federal courts have an expertise in the nuances of federal law that state courts cannot match; 2) federal rights should not vary with state geographic considerations; 3) there is an inherent potential for bias when state judges are compelled to review direct monetary decisions (particularly welfare decisions) of other state officials. In short the assumption of jurisdiction *sub judice* is desirable from the standpoint of practicality and further is completely in harmony with the guiding principles of federalism.

POINT IV

PETITIONER'S COMPLAINT PRESENTS A SUBSTANTIAL CONSTITUTIONAL CLAIM UNDER UNITED STATES CONSTITUTION ART. 6 CL. 2 WHICH IS JURISDICTIONALLY COGNIZABLE UNDER 28 U.S.C. 1343(3).

6. The underlying claim at bar is with respect to AFDC emergency assistance which is funded almost entirely by the federal government.

A. Petitioners complaint presents a constitutional claim within the meaning of 28 U.S.C. 1343(3).

The within action was brought under 42 U.S.C. Sec. 1983 seeking to restrain respondents, county and state welfare officials from enforcing a New Jersey regulation, N.J.A.C. 10:82-5.12 alleged to be in conflict with the Social Security Act Sec. 606(e)(1), 42 U.S.C. 606(e)(1) and 45 C.F.R. 233.120 thereby depriving petitioners of a right secured by Article VI Cl. 2, the Supremacy Clause, of the United States Constitution.

Article VI Cl. 2 of the Constitution provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Law of any State to the contrary notwithstanding."

Petitioners recognize that 42 U.S.C. 1983 does not of itself confer jurisdiction for deprivation of rights secured by the Constitution and therefore rely on 28 U.S.C. 1343(3) which in pertinent part provides:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Jurisdiction under 28 U.S.C. 1343(3) has been found by this court in several cases involving welfare claims where relief has been sought under 42 U.S.C. 1983 to restrain state officials from enforcing a state statute or regulation alleged to violate the Constitution, see *Dandridge v. Williams*, 397 U.S. 471 (1970); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Although the aforementioned cases have involved the more frequently pleaded constitutional violations of due process and equal protection under the Fourteenth Amendment, this court has long ago recognized that where a claim is made that a statute or regulation conflicts with or is pre-empted by federal law a constitutional issue under the Supremacy Clause is involved. See *Gibbons v. Ogden*, 9 Wheat 1, 6 L. Ed. 23 (1824).

In two recent cases under 42 U.S.C. 1983 involving substantive welfare claims this court has affirmed the principle. *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972). In *Townsend*, Supra, at 286 a challenge was made to the validity of the Illinois law excluding from AFDC benefits needy dependent children 18 through 20 years old who were attending college or university. Justice Brennan speaking for a unanimous court said, "We hold that the Illinois statute and regulations conflict with Sec. 406(a)(2)(b) and for that reason are invalid under the Supremacy Clause". In *Remillard*, supra, 406 U.S., at 601 a challenge was made to California's welfare law which excluded absence because of military service from the definition of "continued absence" for purposes of welfare eligibility. Justice Douglas, for a unanimous court, said: "If California's

definition conflicts with the federal criterion then it, too, is invalid under the Supremacy Clause". Also in *Williams v. Wohlgemuth*, 540 F.2d 163, 170 (1976) where the facts are identical to the case at bar the court stated, "We thus conclude that the emergency assistance plan established by the Commonwealth of Pennsylvania, by confining the right to receive such assistance to those persons whose emergencies were caused by civil disorder or natural disaster, is not congruent with the Social Security Act. As such, it is invalid under the Supremacy Clause of the Constitution".

Petitioners recognize that in each of these cases the court did not specifically pass on the question of whether the Supremacy Clause comes within the "secured by the Constitution" language of 28 U.S.C. 1343(3) for purposes of federal jurisdiction. In fact this court has noted the issue in *King v. Smith*, 392 U.S. 309 at 312 N.3; "We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statutes may be brought in Federal Court".

Also in *Hagans v. Lavine*, 415 U.S. 533, N.5 (1973) the court was aware that a federal-state conflict, although categorized as statutory, was in reality a constitutional claim arising under the Supremacy Clause which might be jurisdictionally cognizable under Sec. 1343(3). The court however found it unnecessary to deal with the issue in that case stating that "It is therefore urged that the 'secured by the constitution' language of Sec. 1343(3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day".

Although these cases indicate that this court has yet to make a specific finding regarding a Supremacy Clause issue

supporting 1343(3) jurisdiction, the court's prior decision in *Townsend, Remillard* and *Hagans* inevitably lead to this conclusion. These cases have defined federal-state conflict or pre-emption claims as grounded in the Supremacy Clause of the Constitution.

Furthermore there is nothing in the language of the statute or existing case law that limits the kind of nonfrivolous constitutional claims which would qualify as 'secured by the constitution' for purpose of jurisdiction under 1343(3). Attempts to carve out a distinction between personal and proprietary rights secured by the Constitution as found in Justice Stone's opinion in *Hague v. CIO*, 307 U.S. 496, 531 (1939) and in *Eison v. Eastman*, 421 F.2d 960, 563 (1969) were laid to rest in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 549 (1970) which rejected that approach on the basis that "people—not property—have rights".

Justice Stewart in discussing that legislative history and scope of 1343(3) said:

> "The 'cardinal rule . . . that repeals by implication are not favored", *Pasadas v. National City Bank*, 296 U.S. 497, 503; *Jones v. Mayer Co.*, 392 U.S., at 437, thus counsels a refusal to pare down Sec. 1343(3) jurisdiction—and the substantive scope of Sec. 1983—by means of the distinction between personal liberties and property rights, or in any other way. The statutory descendants of Sec. 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origins and their language dictate".

The court, in a footnote, cited with approval from *United States v. Price*, 383 U.S. 787, 797 (1966) where that court interpreted the phrase "rights, privileges, or immunities secured . . . by the Constitution or laws of the United

States", contained in 18 U.S.C. Sec. 242, to embrace "*all* of the Constitution and laws of the United States". *Lynch*, 405 U.S. at 549, N.16.

Lower Federal Court support for the argument that the Supremacy Clause issue comes within 1343(3) jurisdiction can be found in *Blue v. Craig*, Supra. at 842-844 (4th Cir. 1974) and in *Connecticut Union of Welfare Employees v. White*, 55 F.R.D. 481, 486 (Conn. 1972). In *Blue*, a 1983 claim was brought alleging that the state plan for medical assistance deprived recipients of aid secured them by the Social Security Act and Regulations. The Appeals Court found several grounds for jurisdiction under 28 U.S.C. 1343(3) and (4) stating that a federal-state conflict gives rise to a constitutional issue under the Supremacy Clause which is jurisdictionally cognizable under 28 U.S.C. 1343(3). The Appeals Court reviewed the Supreme Court cases involving the Supremacy Clause and concluded that their decisions "point inescapably to the conclusion 'that the secured by the constitution' language of Sec. 1343(3) should not be construed to exclude Supremacy Clause issues". The District Court in the *Connecticut Union* case in discussing the jurisdictional issues involved under 1343(3), while constrained to follow its own Appeals Court in *Rosado v. Wyman*, 414 F.2d 170 said: "It seems to me that a compelling case can be made for the proposition that jurisdiction is properly grounded on Sec. 1343(3). If the state policy is in conflict with the federal statute, as alleged in the complaint, this would deny plaintiff a right secured by the Constitution—namely, the right to secure the benefit of the Supremacy Clause".

The court below in the case at bar relied on *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975) in support of its

conclusion that when a claim is made that a state statute or regulation conflicts with federal law, it is not cognizable under 28 U.S.C. 1343(3) as a deprivation of rights "secured by the Constitution".

Petitioners contend that this reliance is misplaced and that the application of the standards previously expressed by this court requires a reversal of the lower court decision. The reasoning in *Andrews* is faulty on several counts. It rejected, contrary to the weight of Supreme Court authority in *Townsend, Remillard* and *Hagans* the principle that a federal-state conflict claim gives rise to a constitutional issue under the Supremacy Clause.

Instead *Andrews* cites *Swift & Co. v. Wickham*, 382 U.S. 111 (1968) as authority for the proposition that "the Supreme Court rejected a similar attempt to construe statutory claims as Supremacy Clause (and therefore constitutional) claims in the context of 28 U.S.C. 2281". The court in *Andrews* has misconstrued *Swift*, which in reality held that "Any such preemption or conflict claim is of course grounded in the Supremacy Clause of the Constitution, if a measure conflicts with a federal requirement, the state measure must give way". *Swift* did not find federal-state conflict claims to be non-constitutional claims, to the contrary, it created a constitutional exception to the three judge court statute, 28 U.S.C. Sec. 2811 for policy reasons which had their genesis in the establishment of the three judge court statute. Justice Harlan in writing for the majority in *Swift* said, "Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies". The court in *Swift* did not consider a conflict between a federal

regulation, applying to labeling of total net weight on frozen stuffed turkeys, and a New York statute requiring a different net weight figure, to be sufficiently important an issue to require the collective judgment of three federal judges, and therefore left it and similar federal-state conflict issues to the jurisdiction of a single federal judge.

The court in *Andrews* would have us believe that *Swift* by analogy stands for the proposition that Supremacy Clause claims are not constitutional questions for purposes of federal jurisdiction under 1343(3). Because Supremacy Clause claims did not require the convening of a three judge court under Sec. 2281, it does not follow that a single judge should not find Civil Rights jurisdiction under Sec. 1343(3) which has been liberally interpreted by the court.

With the repeal of the three Judge Court Statute Public Law 94-38 (August 12, 1976) all constitutional challenges, be they Supremacy Clause issues, or otherwise are now heard by a single-federal judge except in limited circumstances not applicable here.

B. Petitioners constitutional claim is of sufficient substance to support federal jurisdiction under 28 U.S.C. 1343(3).

The test of substantiality has been clearly set forth in several cases of this court, *Baker v. Carr*, 369 U.S. 186 (1962), *Goosby v. Ossner*, 409 U.S. 512 (1973) and *Hagans v. Levine*, supra. Justice Brennan speaking for the majority in *Baker*, supra at 189, regarding the constitutional issues raised in the Complaint said, "Dismissal of the Complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that

claim were so attenuated and unsubstantial as to be absolutely devoid of merit or frivolous, that the claim is unsubstantial must be very plain". And the court in *Hagans*, supra, in discussing what constitutes a substantial constitutional claim for purposes of determining the threshold question of jurisdiction under 28 U.S.C. 1343 quotes at length approvingly from the *Goosby* decision:

> "Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious; *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial'. ibid; obviously frivolous'; *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit; *Ex parte Paresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality only if the prior decisions unescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. Sec. 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'."
> Id., at 538 (citations omitted).

Petitioners contend that application of the *Goosby* standards to the Supremacy Clause argument presented in the Complaint, clearly demonstrate that the claim is substantial. The Appeals Court below erroneously held that the constitutional claim was insubstantial. Circuit Judge Aldisert speaking for the court below said, "We conclude

that jurisdiction must rest on a constitutional claim of sufficient substance; independent of statutory conflicts under the Supremacy Clause."

In support of the lack of constitutional substantiality the court relied on the Second Circuit case in *Andrews v. Maher*, supra while cognizable that another circuit of equal persuasion had held otherwise, *Blue v. Craig*, supra. Under *Goosby*, where a conflict in the circuits is involved, the claim would not be frivolous. At most it would be considered doubtful, but even if doubtful it would survive a jurisdictional attack on the question of constitutional substantiality and therefore should be decided on the merits.

CONCLUSION

The court should hold:

1) 42 *U.S.C.* 1983 is an Act of Congress providing for equal rights of citizens as required by 28 *U.S.C.* 1343(3).

2) 42 *U.S.C.* 1983 is an Act of Congress providing for the protection of civil rights as required by 28 *U.S.C.* 1343(4).

3) Since 1343(3), 1343(4) and 1983 are coextensive jurisdiction is established in the instant case even accepting *arguendo* the premise that the Social Security Act is not an Act of Congress providing for equal rights or for the protection of civil rights.

4) The Supremacy Clause satisfies the "secured by the Constitution" requirement of 28 U.S.C. 1343(3) thus providing an alternative basis for jurisdiction.

The judgment of the 3rd Circuit directing that the complaint be dismissed for want of jurisdiction should be reversed.

Respectfully submitted,

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